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NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I. INTRODUCTION.

A. Florida's Bright-Line Test.

Respondent Riley and supporting amici curiae contend Florida's proposed test for constitutional warrantless aerial surveillance (valid so long as the aircraft is operated where it lawfully may be) is not a bright-line because the right to pilot an aircraft at specific heights is

always subject to safety considerations. They also suggest that low level helicopter surveillance is dangerous and has a "potential" for "disturbance" or "intrusion." Br. for Respondent at 32.

These contentions mask the very simplicity of Florida's suggested rule. All Florida asks is that aircraft making police aerial observations be permitted to do the same things all other like aircraft may do. Florida asks simply that such pilots be permitted to go where applicable statutes and regulations (adopted without reference to police surveillance) say they may go. As to helicopters, this means at any height they may fly with safety to the aircraft and the ground.

B. The Arguments of Respondent and Supporting Amici.[1/]

Respondent Riley's Position.

Riley argues that the facts in the record are other than as portrayed by Florida in its initial brief on the merits and his case is factually distinguishable from this Court's recent decision upholding warrantless aerial surveillance, California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("Ciraolo").[2/]

The former assertion is belied by the record itself (see II, infra). As for the latter assertion, no factual differences

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1/ None of the parties or amici curiae has sought to defend the dual rationale (the "non-navigable airspace"/"targeted patrol" holding) of the decision below on its own terms.

2/ Riley told the Florida Supreme Court the facts in his case and Mr. Ciraolo's were "very similar." Brief of Petitioner [Riley] (at 6), Riley v. State, 511 So.2d 282 (Fla. 1987), quoted in Petitioner's [Florida's] Br. on the Merits at 35 n. 31.

warrant a different result than this Court reached in Ciraolo.

Riley contends (i) he demonstrated a subjective expectation of privacy and (ii) society should recognize that expectation as legitimate, i.e., objectively reasonable, under the "Katz test" of a "search" under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("Katz"). Although Riley discusses the "second prong" of that test at length, Riley simply assumes the first prong as a given.

Florida and Riley, the parties, do (i) agree on the fundamental test, as capsulized in Justice Harlan's concurrence in Katz (389 U.S. at 360, 88 S.Ct. at 516, 19 L.Ed.2d at 587), and (ii) agree that Ciraolo explicitly applied that test to warrantless aerial surveillance. The parties disagree as to whether the decision below

properly followed Ciraolo in applying the Katz test to the warrantless naked eye helicopter observation here of the contents of Riley's greenhouse.

Positions of Amici Curiae Seeking Affirmance: NACDL, CACJ, CLMP, COVER, and ACLU.

In contrast to Riley's fact-specific arguments under Ciraolo, but like a number of law review commentators, various amici curiae supporting affirmance simply reject Ciraolo and counsel either its de facto circumvention or its outright overruling. They argue explicitly either that:

(i) this Court wrongly decided Ciraolo (the central argument of the National Association of Criminal Defense Lawyers ("NACDL"));3/ or

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3/ According to NACDL (NACDL Br. at 11), "Ciraolo's reliance on public navigable airspace and the 'physically non-intrusive' manner in which the search visited upon Ciraolo (and upon Riley) was conducted is (continued...)

(ii) helicopters are so fundamentally more intrusive of privacy than airplanes that Ciraolo ought not control here (the arguments of California Attorneys for Criminal Justice ("CACJ") and Civil Liberties Monitoring Project ("CLMP")[4/] and Community Outreach to Vietnam Era Returnees, Inc. ("COVER"));[5/] or

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3/ (...continued)
in direct derogation of Katz, and should for that reason be abandoned."

4/ CACJ and CLMP (CACJ/CLMP Br. at 11) propose a bright-line "bubble": "Amici thus propose a bright-line rule that would prohibit all warrantless helicopter surveillance of the curtilage undertaken from within a hemisphere extending 500 feet from the outer circumference of the curtilage of any residence."

5/ COVER (COVER Br. at 3 passim) proposes a bright-line similar to the one proposed by CACJ and CLMP: "Warrantless Surveillance of Homes at Altitudes Below Five Hundred Feet Violates Core Fourth Amendment Protections." (Argument caption).

(iii) the asserted presence of curtilage, which they find in Riley's "greenhouse," ought to make an outcome-determinative difference (principally, the argument of the American Civil Liberties Union et al. ("ACLU"))[6/] -- a proposition already rejected by Ciraolo.

6/ ACLU, rather unlike CACJ, CLMP, and COVER, rejects bright-lines and does not apparently propose any altitude-based alternatives of its own. Instead, ACLU seems to say if curtilage is the subject, no aerial view is constitutional.

All these amici rely on "NORML"[7] for inspiration, if not doctrine.[8]

7/ "NORML" stands for National Organization for Reform of Marijuana Laws. "NORML" was a class action brought by NORML against federal and California state and local law enforcement officials. See NORML v. Mullen, 608 F. Supp. 945 (N.D. Cal. 1985), remanded for consideration of subsequent authority, 796 F.2d 276 (9th Cir. 1986), order modifying Paragraph 3 of the preliminary injunction entered (N.D. Cal. Sept. 16, 1986) (No. C-83-4037-RPA) (unreported), consent decree entered (N.D. Cal Dec. 18, 1987) (unreported) (the "Consent Decree"). See generally NORML v. Mullen, 112 F.R.D. 120 (N.D. Cal. [Sept. 8,] 1986) (order of reference to master), petition for writ of mandamus denied, 828 F.2d 536 (9th Cir. 1987).

8/ CACJ and CLMP (whose counsel of record in this Court was NORML's counsel in NORML) devote almost all their brief to selective quotation of the Consent Decree in NORML, supra, but attach no portion of the documents referred to, many of which are not published. They claim the approval by the federal government (executive branch) of the U.S. Attorney entering into the Consent Decree in NORML (imposing the bright-line "bubble" described in note 4, supra) "is extremely significant, and lends support to our [CACJ/CLMP] 'bright-line' proposal." CACJ/CLMP Br. at 13 n. 4. Justice Department officials routinely review consent decrees in class actions in which the United States

(continued...)

In Florida's view, NACDL's approach is intellectually honest, but mistaken. By contrast, the arguments of CACJ, CLMP, COVER, and ACLU are not principled, since they, like the decision below, purport to follow Ciraolo while rejecting its tenets.

II. A REVIEW OF THE RECORD SHOWS THAT FLORIDA'S FACTUAL STATEMENTS ARE ACCURATE AND RILEY'S CONTENTIONS TO THE CONTRARY ARE NOT.

Although the facts are simple and straightforward, Riley purports to disagree with Florida's portrayal of the record. Br. for Respondent at 8-9. Riley's

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8/(...continued)
is a party defendant. Further, the NORML Consent Decree contains all the standard disclaimers and recites all defendants' express denial of any violations of any provision of the United States and California Constitutions and laws (Consent Decree, II (A) (General Provisions at 6)).

disagreements with Florida's Statement of the Case are not well taken.[9]

Altitude of Florida's Helicopter. Contrary to Riley's unsupported assertion, there is no evidence the police helicopter here flew below 400 feet altitude.[10]

Towering Marijuana Plants. Riley guesses as to the likely height ("8-feet high") of the greenhouse and the number of the total 44 marijuana plants near that height. The photographic evidence supports Florida's quotation of the prosecutor's description of the height ("6-12 feet") of the marijuana plants.

The Gaping Holes in Riley's Greenhouse Roof. Riley asserts there is "no evidence the holes in the roof [of his greenhouse] were caused by [his] 'conscious act'. . . ." But he testified he built the greenhouse (J.A. 47-48) and he ignores the trial court's finding the two openings in the roof "appear to be caused by either removing or not installing two of the corrugated roofing panels," (J.A. 93-94) with the "purpose of the opening in the roof [being] to admit sunlight . . . and possibly permit circulation of air." J.A. 96. These facts fully support Florida's inference that the openings were "apparently. . . caused by the conscious act of 'removing or installing' part of the roof."[11]

9/ Riley also treats assumptions of the court below as "facts." E.g., Br. for Respondent at 5 ("The [Florida Supreme C]ourt determined the contents of Riley's greenhouse were not exposed to the public flying in public navigable airspace. . . ."). He also relies on that court's descriptions of helicopters and what the public flying in public navigable airspace could see (e.g., id. at 16), which assertions were not based on the record. Petitioner's Br. at 8-9.

10/ Cf. J.A. 113 n.1 ("evidence was unclear"). Of course, Florida contends the specific height of flight is irrelevant so long as it was lawful.

11/ Petitioner's Br. at 7, c. Florida does not claim that Riley personally removed

(continued...)

In any case, Riley does not claim he was unaware that ten percent of the top of the greenhouse was exposed, nor that two sides of the "greenhouse" were open and exposed to the sky, wind, and elements.

Evidence of Intent to Conceal Contents from Ground, but Not Aerial, Views. Riley claims there is an "abundance of direct evidence" of Riley's intent to conceal the contents of his greenhouse. But Riley did not testify at all as to his subjective intent to conceal. And the only direct evidence of a subjective actual intent to conceal the marijuana cultivating operations was a "DO NOT ENTER" sign posted in front of the mobile home.[12/] The sign and the physical attributes of the property, even

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11/ (...continued)
or failed to install the missing panels, although the record certainly supports that inference.

12/ Petitioner's Br. at 7(e).

if they show intent to conceal the marijuana plants from ground observations, tell one nothing of Riley's intent to conceal that marijuana from aerial observation. All objective physical manifestations of Riley's supposed intent show exposure of the contents of the greenhouse to observations from the air, not their concealment from such observations. The photographic evidence dramatically confirms this. To claim that Riley did not "knowingly expose" (Riley's words)[13/] the contents thereof on those facts is to deny reality.

Inferences to Be Drawn from the Evidence: No Reasonable Efforts to Conceal. Riley proceeds as if his burden is met simply by having convinced the trial court that "the purpose of the opening in the

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13/ Br. for Respondent at 10, 22, 23.

roof was not to allow a viewing of the contents. . . .," J.A. 96, quoted in J.A. 103 (emphasis added), but was instead for improvement of marijuana growing conditions. Id. In effect, Riley argues he or any other marijuana manufacturer exhibits an adequate expectation of privacy (subjective and objective) so long as he or she does not purposefully expose the contents of his greenhouse to police aerial observation.

"A Room with a View": Helicopters Versus Airplanes as Aerial Platforms. Riley joins the Florida Supreme Court in its extra-record and baseless assumption that what was seen here from a helicopter, could not "as easily" be seen here from an airplane.14/ As with the court below, aspersions are cast on helicopter observation, with no record basis.

14/ Compare Petitioner's Br. at 9(i)(4), with Br. for Respondent at 8-9, þ(9)(d).

Business Use of the Property.

a. The "Distribution" Strawman. Riley purports to disagree with Florida's Statement of the Case by saying "[t]here are no facts indicating Riley was . . . involved in the distribution of marijuana. . . ."15/ The simple response is that Florida did not, in its information or its brief, claim to the contrary.16/

15/ Br. for Respondent at 9(e).

16/ As stated in Petitioner's Br. (at 9, 14), Riley was charged with "the unlawful manufacture and possession of marijuana." See J.A. 3-6. See Florida Comprehensive Drug Abuse Prevention and Control Act, Ch. 893, Fla. Stat. (1983). There is no allegation in the information (J.A. 3-6) that Riley is a "distributor," meaning a person who "distribute[s]," meaning a person who "deliver[s] . . . a controlled substance," meaning "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." §§ 893.02(4) & 893.02(6)-(7), Fla. Stat. (1983), as renumbered, § 893.02(5) & 893.02(7)-(8), Fla. Stat. (1987).

b. "Manufacture."[17/] Riley asserts the record does not show "Riley was in any way involved . . . in any business venture involving any illicit drugs."[18/] The record facts, set forth in Florida's initial brief, speak for themselves.[19/] The inference of a business enterprise from these facts is legitimate.

17/ By statute, "'Manufacture' means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance. . . ." § 893.02(11)(a), Fla. Stat. (1983), as renumbered, § 893.02(12)(a), Fla. Stat. (1987).

18/ Br. for Respondent at 9(e).

19/ See Petitioner's Br. at 35-36. ("Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business." (emphasis added)).

III. ALTHOUGH CONCEPTS OF CURTILAGE HAVE LITTLE RELEVANCE TO NAKED-EYE AERIAL OBSERVATIONS, SUBSTANTIAL DOUBT AS TO THE EXISTENCE OF CURTILAGE REMAINS.

Florida believes the claimed status of Riley's greenhouse as curtilage is irrelevant under Ciraolo, because its contents were readily and plainly visible from the air. But Florida also continues to harbor grave doubt as to the characterization of the greenhouse as curtilage.[20/]

20/ Respondent and supporting amici are eager to cling to the mantle of curtilage, an 18th century common law property concept, whose updated contours for Fourth Amendment purposes are defined by United States v. Dunn, ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), reh'g denied, ___ U.S. ___, 107 S.Ct. 1913, 95 L.Ed.2d 519, on remand, 817 F.2d 18 (5th Cir. 1987) (per curiam) (mem.), but an ancient property concept nonetheless designed to protect truly domestic, intimate, familial activities. In the face of Florida's questioning of curtilage, Riley and the amici speak neither to the present nor the past, for when it comes to curtilage, they know that concept was never designed to make manufacturing facilities private. E.g., Dunn, supra, ___ U.S. ___, ___, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring).

In addition, Florida's separate, but related, inference that Riley lived on business premises, if accepted, might moot the question of curtilage altogether. See Dunn.

Riley was charged with conduct of a "manufactur[ing]" (i.e., cultivating) operation, which Florida submits can reasonably be inferred to have been a business enterprise.[21/] Nobody expects Riley to confirm this inference, by freely testifying as to a criminal business purpose. Likewise, nobody should expect police in a helicopter to debate among themselves whether

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21/ Whether Riley was engaged in a business enterprise under Florida criminal law, or for federal income tax purposes, is not the issue under Dunn. Further, that Riley was not charged with "distribution" hardly transforms his "manufacturing" of illegal drugs into an intimate activity of the home. In Florida's view, even assuming the mobile home here constituted a residential dwelling, it does not follow the greenhouse was curtilage.

somebody's exposed marijuana lies in a paradigmatic Blackstonian curtilage before they may look at it. At a minimum, Florida submits the concentration of Respondent on curtilage is misdirected.

IV. THERE IS NO EVIDENCE RILEY HAD A SUBJECTIVE EXPECTATION OF PRIVACY FROM WARRANTLESS NAKED-EYE AERIAL OBSERVATION FROM A LAWFUL PUBLIC VANTAGE POINT.

Florida maintains Riley failed to demonstrate a subjective expectation of privacy (in the contents of his greenhouse) from warrantless naked eye aerial observation from a lawful public vantage point.[22/] Florida believes that Katz requires Riley to prove his subjective expectation. Riley apparently contends this Court should simply assume it.

22/ See Petitioner's Br. at 18 & n. 10. The court below denied Florida's motion for rehearing on this very point without explanation. J.A. 141-43, denied, J.A. 154.

A. Ciraolo Reserved The Question of Defendant Ciraolo's Subjective Expectation of Privacy With Respect To Aerial Observation of His Curtilage.

In Ciraolo the lower court's determination that Mr. Ciraolo had a subjective expectation of privacy was not challenged by the state. This Court emphasized this, but nonetheless expressed doubt as to the adequacy of the showing of subjective expectation:

(i) "However, we need not address that [subjective expectation of privacy] issue, for the State [of California] has not challenged the finding of the California Court of Appeal that respondent had such an expectation."23/

23/ Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1811-12, 90 L.Ed.2d at 215 (emphasis and brackets added).

(ii) "It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street level views."24/

(iii) "So far as normal sidewalk traffic was concerned, this fence served that purpose, because respondent 'took normal precautions to maintain his privacy.'"25/

(iv) "Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus."26/

(v) "Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe

24/ Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1812, 90 L.Ed.2d at 215 (emphasis added).

25/ Id. (case citation omitted and emphasis added).

26/ Id. (emphasis added).

his unlawful gardening pursuits, is not entirely clear in these circumstances."27/

Florida does challenge the conclusion that Riley had an actual expectation of privacy from aerial observation. Further, Florida does express grave doubt as to the conclusion that the greenhouse was curtilage. Thus the "first prong" question reserved in Ciraolo is squarely presented here.

B. Riley Ignores the Ciraolo Qualifiers and Disclaimers and Offers No Meaningful Response to Florida's "No Subjective Expectation" Argument.

Rather than explain how he manifested an actual expectation of privacy from aerial (as opposed to ground) observation, Riley makes the naked assertion the courts below "justifiably" determined just that. He never shows the basis of that asserted determination. Riley really wishes this Court, as compliance with the first prong of the Katz test, to accept "that few criminals subjectively desire their acts to be detected."28/

27/ Id. (emphasis in original), quoted in Petitioner's Br. at 18 n. 10.

C. The First Prong of the Katz Test and the Ciraolo Qualifiers and Disclaimers Must Be Taken Seriously.

Contrary to Riley and the decision below, the first prong of the Katz test was real to its author, Justice Harlan, and, Florida submits, remains real today under Ciraolo. If Riley fails to meet the first prong, he has no right to a determination whether he meets the second prong. Riley

28/ E.g., Note, Warrantless Aerial Surveillance: A New Dimension, 16 Lincoln L.Rev. 199, 200 (1986) [published 1988] ("Lincoln Note") (citing Granberg, Is Warrantless Aerial Surveillance Constitutional?, 55 Cal. S.B.J. 451 (Nov. 1980)).

must show he actually intended the roof and sides of his greenhouse[29/] would conceal the marijuana from aerial view.[30/]

Whatever Riley's subjective expectation of privacy from ground level observation, Ciraolo teaches that a subjective expectation of privacy from aerial observation may be different. The law reviews have read Ciraolo as does Florida. Ciraolo's critics

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29/ Moreover, since Riley disclaims the acts of roof panel removal, or failure to install, are "conscious" -- or even his -- it is not entirely clear how Riley can claim to have built anything for purposes of concealment. Certainly Riley has no pretense of domestic usage equivalent to that of Mr. Ciraolo.

30/ The Florida Supreme Court also seemed to equate a curtilage holding with a subjective expectation holding and, paradoxically, to predicate that equation on Ciraolo itself. See J.A. 118 (quoting 476 U.S. at 211, 106 S.Ct. at 1811, 90 L.Ed.2d at 215). Certainly Riley may attempt to argue his greenhouse was curtilage and that impacts his actual expectations (particularly as to street level observation), but the issue, contrary to Riley and the court below, is expectations, not curtilage.

acknowledge that "decision was reached by application of the Katz standard." Lincoln Note, supra, at 206. The manifestation of subjective intent may be different with respect to ground and aerial observations.[31/]

Florida submits that the partially uncovered roof and the exposed sides disprove any subjective intent to conceal from aerial observation and therefore Riley failed the first prong of Katz.

31/ "In this [Ciraolo] case, therefore, it was found not to be clear if the defendant had manifested an [actual, subjective] expectation of privacy from all observations of his backyard." Lincoln Note, supra, at 206. (emphasis in original and brackets added). See also Petitioner's Br. at 18 n. 10.

V. EVEN ASSUMING RILEY HAD A SUBJECTIVE EXPECTATION OF PRIVACY FROM AERIAL OBSERVATION AND FURTHER THAT HIS GREENHOUSE WERE CURTILAGE, RILEY COULD HAVE HAD NO OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY FROM WARRANTLESS NAKED-EYE AERIAL OBSERVATION FROM A LAWFUL PUBLIC VANTAGE POINT.

A. Riley Misreads Ciraolo.

Even if Riley satisfied the first prong of Katz, he fails to satisfy the second prong that he had an objectively reasonable expectation of privacy from warrantless naked eye aerial observation from a lawful vantage point. Ciraolo compels that conclusion.

This Court recently observed:

> Similarly, we held in California v. Ciraolo, supra, that the police were not required by the Fourth Amendment to obtain a warrant before conducting surveillance of the respondent's fenced backyard from a private plane flying at an altitude of 1,000 feet. We concluded that the respondent's expectation that his yard was protected from such surveillance was unreasonable because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S., at 213 - 214, 106 S.Ct., at 1813.

California v. Greenwood, ___ U.S. ___, ____, 108 S.Ct. 1625, 1629, 100 L.Ed.2d 30, 37 (1988) (emphasis added).

Justices Brennan and Marshall, who dissented in Ciraolo and Dow[32/] and Greenwood, nevertheless stated:

> [When persons or animals] actually ...expose its contents to plain view, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," ante, [___ U.S., at ___, 108 S.Ct.,] at 1629. That much follows from cases like . . . California v. Ciraolo, 476 U.S. 207, 213-214, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210 (1986) (emphasis added), which held the Fourth Amendment does not prohibit police from observing what "[a]ny member of the public flying in

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32/ Dow Chemical Co. v. United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

this airspace who glanced down could have seen."[33]

B. Despite the Requests of One Amicus to Overrule Ciraolo and Respondent and Other Amici to Interpret It Away, Ciraolo Was Correctly Decided and Controls the Result Here.

1. What Is Knowingly Exposed To The Naked-Eye May Lawfully Be Viewed.

Assuming Riley did evince an actual, subjective expectation of privacy from public or police aerial observation, this Court should squarely hold Riley's expectation is not one society is prepared to recognize as objectively reasonable (i.e., legitimate). This is not just the rule of Ciraolo and Dow, supra. Both these decisions follow from the larger teaching

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33/ California v. Greenwood, supra, ___ U.S. at ___, ___, 108 S.Ct. at 1631, 1636, 100 L.Ed.2d at 40, 45 (Brennan, J., joined by Marshall, J., dissenting) (emphasis in original) (emphasis to Ciraolo quotation added by Justice Brennan as indicated) (brackets added).

of United States v. Knotts, 460 U.S. 276, 103 S.Ct 1081, 75 L.Ed.2d 55 (1983).

Nor would a conclusion that Riley's greenhouse was curtilage change the result. Although the presence of curtilage may effectively mean heightened Fourth Amendment privacy protection (because curtilage can connote a person's heightened expectation of privacy), nothing in Katz or Ciraolo or traditional curtilage doctrine holds that what can be seen exposed therein by the naked eye requires a warrant.

2. Neither Ciraolo Nor Any Appropriate Lawful Vantage Point Test Turns On Any Reference To "Navigable Airspace."

NACDL faults Ciraolo for using "navigable airspace" as a wooden, mechanical "horizontal property line in the sky." NACDL Br. at 11. NACDL is wrong; Ciraolo draws no property or boundary lines in the sky; it simply asks whether the vantage

point was lawful by asking, in that case, whether the aircraft was where it could be. Nor do any of this Court's Justices appear to read Ciraolo as "navigable airspace" decisions either. Their descriptions of Ciraolo in California v. Greenwood, supra, do not employ the phrase, "navigable airspace."[34/] Nor does Ciraolo cite to FAA aircraft altitude and safety regulations. Ciraolo is quintessentially a "lawful public vantage point" "plain view" case. Florida's proposed test is phrased in similar terms. Florida looks, for all aircraft, to the "lawful public vantage point" endorsed by Ciraolo and Dow.

Of course, where aircraft may lawfully fly is subject to change. If tomorrow, Congress forbade aircraft to fly below 5,000 feet (either to enhance privacy or for any other valid purpose), Florida would

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34/ See, text, pp. 26-28, supra.

accept that people on the ground would have a legitimate expectation of privacy from aerial observation made from a point below that aerial floor. People, whether innocent or criminal, would then be presumed to know that police planes and helicopters could not legally fly below that altitude, and consequently such legitimate expectation would define the foreseeable "floor" for lawful police aerial vantage points for Fourth Amendment warrantless aerial observation.

Florida has never asserted the Fourth Amendment is controlled by any statute or regulation. Rather, Florida has observed the statute or regulation may condition all persons' expectations. The rule proposed by Florida meets the expectation of the pilot, who is trained to know the rules of lawful flight for all purposes, including aerial observation. It also meets the

expectation of the person on the ground, in calculating what is likely to remain private. And, of course, it is practical for the judiciary to administer.

C. Warrantless Naked-Eye Aerial Surveillance From A Lawful Public Vantage Point Is Clearly Permissible Even If The Area Viewed Is Curtilage.

This Court has long held that unaided police observations from a lawful public vantage point do not constitute a search.[35/] The latest round of law review commentaries -- published and indexed since Florida's initial brief on the merits -- recognize there is a world of difference between naked-eye police aerial observations and

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35/ United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), followed in Ciraolo, supra.

technological augmentation of the human senses.[36/]

Current academic thinking would place the Fourth Amendment battleground in technological augmentation of the senses, not in the mundane and relatively settled realm of naked-eye aerial observation:

> [A] careful definition of when the use of technology by police constitutes a search will provide the solution: A search is the use of technology to augment the senses in order to obtain information that could not have otherwise been obtained from a lawful public vantage point without such an augmentation. In other words, it is not a "search" to use technology to augment the senses in order to obtain information that would be otherwise obtainable from a lawful vantage point without the aid of sensory augmenting devices.[37/]

36/ E.g., Comment, Law Enforcement Use of High Technology: Does Closing the Door Matter Anymore?, 24 Cal. W. L. Rev. 83 (1988) ("Cal. W. Comment").

37/ Cal. W. Comment, supra, at 94. See generally id. 88-90 & n. 60.

The academic commentators also recognize -- unlike Riley, the amici, and the decision below -- that the existence of curtilage does not change the calculus:

> Both the Dow and Ciraolo courts reiterated the notion that the curtilage is an area in which privacy expectations are reasonable. However, the [F]ourth [A]mendment now protects those expectations only when the government physically intrudes on the curtilage and when the government's surveillance equipment is too technologically advanced.[38/]

Consistent with Katz, Ciraolo recognizes that an area's status as curtilage will not trigger any warrant requirement where no physical intrusion is involved. An aerial view of curtilage would not constitute a search if what can be seen by the police from the air could be lawfully seen by an ordinary member of the flying public at the same altitude.

38/ Note, Technology Encroaches on the Reasonable Expectation of Privacy: Dow Chemical Co. v. United States, 17 N.M.L. Rev. 391, 408 (Spr. 1987) [published 1988] (emphasis added). See generally, Note, The Open Fields Doctrine as Applied to Aerial Photography: Dow Chemical Co. v. United States, 21 Suffolk L. Rev. 256 (Spr. 1987) [published 1988]. One can see and hear the helicopter. Cf. J.M. Granham, Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches, 64 U. Det. L. Rev. 687 (Sum. 1987) [published 1988].

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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